

Office of the Presiding Officer  
Military Commission

8 September 2005

**SUBJECT: Presiding Officers Memorandum (POM) # 3-1: Communications, Contact, and Problem Solving**

**This POM supersedes POM # 3 dated July 19, 2004**

1. This POM establishes general procedures for communications among counsel, the Presiding Officer, and the Assistant to the Presiding Officers. These procedures are designed to avoid *ex parte* communications, to ensure the accused receives a full and fair trial, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications.

2. The preferred, and most reliable, method of communication among the Presiding Officer and counsel is email with CCs to opposing counsel and the Assistant. The following email conventions will be followed. Counsel should review the enclosure on the benefits of email communications.

a. Do not send classified information or Protected Information in the body of an email or as an attachment.

b. Keep emails to a single subject.

c. Use a descriptive subject line in the email. If the email concerns an item that has a filings inventory number, the subject line *must* include that number.

d. Identify, in the body of the email, each attachment being sent.

e. When sending a document that has an attachment, send all the attachments in the same email as the document to which it is an attachment. (The exception would be if such an email would exceed the capabilities of the LAN.) Parties are welcome to make a filing with all the attachments merged into a single document. Legal NCOs are adept at this.

f. Text attachments will be in Microsoft Word. If a recipient does not have this program, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. If an electronic version of a text attachment is not available, it will be sent in Adobe (PDF).

g. Save all emails you send for your record copy of the communication. Remember that all filings that are before the Commission will be listed on the filings inventory, and it is the responsibility of counsel to compare what they think has been properly filed with the filings inventory.

g. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

h. Avoid archiving (WinZip.) Before sending an archived file, get permission from the PO or APO.

i. If the Presiding Officer will need to know classified information to resolve the matter, advise him of that fact in the email and the location of the materials that he will need to review (if such facts or locations are not classified or Protected).

j. Given the number of counsel and the changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not CC'd to a person who needs to have a copy, forward a copy to the person who needs that email and advise the sender of the failure to include the person.

k. Counsel are encouraged to CC their own Legal NCOs and the Legal NCOs of opposing counsel. These NCOs have a measurably positive impact on the efficiency and reliability of the system.

3. Because of frequent changes to the composition of trial teams, the Assistant and/or the Presiding Officer may elect to send an email to the Chief Defense Counsel or Prosecutor, and their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. When the Presiding Officer or the Assistant uses this method, the Chief Legal NCO will CC the Assistant with a copy of the email that the Chief legal NCO sends to the counsel.

4. When telephonic conferences are necessary, the Presiding Officer will designate the person to arrange the conference call.

5. The Presiding Officer is responsible for insuring that each accused receives a full and fair trial. As part of this responsibility, the Presiding Officer is available not only to resolve motions and make rulings, but also to insure that counsel have a place to go to get their problems resolved. Any counsel who has an issue which is not, in her/his opinion, being satisfactorily addressed must present the problem to the Presiding Officer if s/he wants the Presiding Officer to take some action. That request may trigger the need to use procedures set forth in another POM.

Signed by:

Peter E. Brownback III  
COL, JA, USA  
Presiding Officer

1 Enclosure

### **Enclosure to POM # 3-1**

*This enclosure comes from part of an email the Presiding Officer sent on August 4, 2004*

To All Counsel,

1. I received an email from a counsel today asking that a particular "e-mail and (counsel's) response be made part of the record of proceedings and published to the public in keeping with the (accused's) right to a public hearing." I thought it would be beneficial to provide a reply that might assist all.

2. In case some of you missed my thoughts on this matter, let me share with you a portion (slightly edited) of an email I sent recently on the general topic of using email in preparing cases for trial.

Most lawyers and judges find email presents a fast, inexpensive, world-wide accessible, and reliable system to share information among multiple parties. It is, in my opinion, far more reliable, faster, and efficient than multiple mailings, multiple fax transmissions, and tracking down people for conference calls. It provides a record that a document was sent and received, and a record of what was done. For those who travel a lot and who are unsure where they will be, one can check an email account, 24 hours a day, in almost any city in the world. I also believe that email is an excellent way of preserving what has transpired - that is, in fact, one of the reasons I chose this method. If there is a question of what communications were made, and the content of those communications, forwarding a previously sent or received email is easy, and any email can be printed and appended to the record. With many lawyers in different parts of the country, email seems smart, in keeping with the technology of today, and mirroring what is being done in State and Federal courts with electronic filings and the like. While a trial cannot and will not be conducted by email, it works for the purposes I have outlined.

3. Everything which is emailed to me or Mr. Hodges is retained, and I feel certain that counsel have kept and will keep copies as well -- both for their own records and in case one of us misses something.

4. A record of trial will be prepared in this case and will consist of many things we are all familiar with, primarily testimony and exhibits. One type of exhibit - referred to as an Appellate Exhibit in military practice - will be Review Exhibits. I expect that those items or matters which are denominated as Appellate Exhibits in military practice - generally speaking items to complete the record, but which are not used as evidence on the merits or sentencing - will be Review Exhibits for Commission proceedings.

5. I would expect that if there is a dispute on a matter, or if an email or other writing is part of what counsel wants to offer in motions practice, any party may ask that the item be marked as an RE or offer it as an attachment to an RE. It would probably be unwise to mark every email or writing exchanged between the parties because of the volume involved, but if a counsel thinks it is necessary that an item be marked as an RE, it will be so marked and appended.

6. As to the reference to the emails being "published," I'm not sure of the meaning of that term in this context. After a case is completed, a record of the proceedings will be prepared and forwarded to the Appointing Authority for his action. That is the extent of my publication of documents in this case. As to being published to the public, there is Commission Law on how matters are provided to the public and the role of Public Affairs in that regard. If I missed the meaning, let me suggest counsel wait until we are together in session to discuss it.

7. Incidentally, to assist counsel in identifying and pre-marking trial exhibits, to include REs, I am preparing a POM on that matter (*subsequently issued as POM # 8.*) For those who have problems with Roman numerals (a group which includes the Presiding Officer), you should be pleased to learn that Roman numerals will not be used for REs.

COL Brownback